No. 16036

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT N. CAMERON and
JACK CRAWFORD,

Appellants,

vs.

VANCOUVER PLYWOOD CORPORATION,

Appellee.

PLAINTIFFS' BRIEF

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF JURISDICTION

This action was filed in the Circuit Court of the State of Oregon for Douglas County and was removed to the United States District Court for the District of Oregon on the petition of the defendant alleging that the District Court had original jurisdiction under the provision of Title 28, United States Code, Section 1332, and Title 22, United States Code, Section 1441 in that it was a civil action wherein the amount in controversy exceeded the value of Three Thousand ($3,000.00) Dollars exclusive of interest and costs and was between

citizens of different states, the plaintiffs being citizens of the State of Oregon and the defendant being a corporation incorporated under the laws of the State of Washington and not incorporated under the laws of the State of Oregon.

STATEMENT OF FACT

This is an action brought by the plaintiffs as co-partners to recover damages for the breach of an oral contract to log a tract of timber in Douglas County, Oregon. The plaintiffs are contract loggers living in southern Oregon. Defendant is a plywood company operating a veneer plant in Springfield, Oregon. It is alleged in the Complaint that the plaintiffs and defendant agreed that the plaintiffs would log a certain tract of timber which the defendant purchased at a government timber sale. The plaintiffs were to be paid Twenty-Nine ($29.00) Dollars per thousand feet, net scale, for all logs delivered to the defendant's plant in Springfield. It is alleged in the complaint that defendant refused to permit the plaintiffs to log this tract of timber and as a result of the breach of the logging contract the plaintiffs sustained damage in the amount of Eighteen Thousand ($18,000.00) Dollars (Tr. 7, 8). The defendant filed an answer in the form of a general denial (Tr. 8). Thereafter the defendant filed a Motion

for Summary Judgment assigning the following ground:

> "* * * there is no genuine issue as to any material fact and that upon plaintiffs' depositions and in view of the relevant facts therein stated, the contract upon which plaintiffs rely herein is contrary to public policy and unenforceable as a matter of law." (Tr. 11)

In support of its motion the defendant claimed in the lower Court that the deposition of the plaintiff Crawford revealed an illegal contract to stifle bidding at a government sale of timber. The motion was predicated entirely on the depositions of the plaintffs which the defendant took before the trial.

From a Judgment of the District Court sustaining defendant's Motion for a Summary Judgment the plaintiffs have appealed.

A Motion for Summary Judgment Will Not Be Granted If There Is Any Legitimate Issue of Fact Presented By the Pleadings.

Guerrero v. *American-Hawaiian Steamship Co.*, 9 Cir., 222 F. 2d 238

Zimmerman v. *Emmons*, 9 Cir. 225 F. 2d 97

Carr v. *City of Anchorage*, 9 Cir., 243 F. 2d 482

Cox v. *English-American Underwriters*, 9 Cir., 245 F. 2d 330

New & Used Auto Sales v. *Hansen*, 9 Cir., 245 F. 2d 951

United States v. *Gardner*, 9 Cir., 244 F. 2d 952

Rules of Civil Procedure, Rule 56 (c)

It is elementary that on a Motion for Summary Judgment the moving party must demonstrate that there is no issue of fact. Conversely, any doubts are resolved against the movant. Summary judgment must be denied if the evidence that such conflicting inferences could be drawn therefrom. In the recent case of *Cox* v. *English-American Underwriters*, (9 Cir.) 245 F. 2d 330, the Court stated the following:

> "In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But

this highly effective device should not be used as a substitute for trial on the facts and law. Especially is this true where the parties are entitled to trial by jury. It may be that plaintiff cannot win this lawsuit before a jury. The mere fact that the trial judge conceives this to be true does not endow him with authority to take the place of the jury and decide hotly contested issues of fact." (p. 333)

It is the position of plaintiffs that their testimony given in their depositions does not indicate the existence of any illegal contract to limit bidding. Viewed in the light most unfavorable to plaintiffs, the issue of illegality is, to borrow Judge Fee's language, a "hotly contested issue of fact" on which the plaintiffs are entitled to a jury trial.

An Agreement Between Two or More Persons Having a Common Economic Interest in Property to Be Sold At Public Sale That One of Their Number Will Enter a Bid Is Not Against Public Policy.

Berg v. *Plitt,* 12 A (2) 609

Henderson v. *Henrie,* 56 SE 369

Pyle v. *Kernan,* 148 Or. 666, 673

Lay v. *Brown,* 151 SW 1001

Powers v. *Ullman, Stern & Krausse Inc.,* 16 SW (2) 910

Sturgis v. *Wylie,* 120 SW (2d) 571

Jones v. *Clary,* 75 SE (2d) 504

6 Corbin on Contracts, Sec. 1375, p. 450

5 Williston on Contracts (Rev. Ed.) Sec. 1663, pp. 4691 - 4692

Restatement of Contracts, Sec. 517

45 ALR 551

The plaintiffs are young contract loggers operating in southern Oregon. They had never been in partnership before but had looked at various tracts of timber together. They owned a limited amount of equipment (Tr. 19) and their total cash at the time the contract was entered into was $6,000 (Tr. 54). At the time this contract arose, they, like a number of other contract loggers in southern Oregon, were on the lookout for a logging job. One of the plaintiffs learned from a Government announcement that a 200-acre tract of timber was to be sold by the Government (Tr. 19). The minimum bid price was approximately $98,000.00 with $5,600.00 to be paid at the time the bid was made and an additional $14,400.00 to be paid at the time cutting commenced. (Tr. 29). The plaintiffs cruised this timber (Tr. 20) and then concluded that the defendant's Springfield plant might be interested in buying the

timber and contracting with the plaintiffs for the logging of it. Plaintiff Crawford had been acquainted for sometime with Bill Smith, the defendant's logging manager in Springfield, and Crawford stated in his deposition that Smith had told him that "any time that I found a piece of timber that I was interested in they would look at it and let me know whether they were interested." (Tr. 21)

On July 1 Crawford went to Smith and told him of the Government sale of this timber and gave him the result of the plaintiffs' cruise (Tr. 21). Smith told Crawford that he would "take his cruiser and go down and look it over" and that if Vancouver was interested they would "either let us sell the logs back to them or he (Smith) would let us log for them for so much a thousand" (Tr. 21, 22).

Vancouver wasted no time in cruising the timber, "three or four days later" Smith called Crawford, told him that Vancouver was interested in buying the timber, and an agreement was made over the telephone for Cameron and Crawford to log the timber for $29.00 a thousand (Tr. 24, 25).

The next day (approximately July 5, 1957) Crawford and Smith met near the log pond of Vancouver Plywood Corporation and they discussed the logging contract with Vancouver (Tr. 24).

Smith requested that the plaintiffs deliver around 75,000 feet of logs a day to defendant's log pond. They also agreed on how the roads should be constructed (Tr. 24).

As time went by, the plaintiffs became worried that they might lose the opportunity of logging the timber, either as a result of the failure of Vancouver to put in a bid for the timber, or as the result of Vancouver's unwillingness to bid more than the minimum Government appraisal price (Tr. 54, 55). The plaintiffs had incurred substantial time and expense in cruising the timber and they did not want this effort to go for naught. Cameron testified,

"Q. Tell me what your discussion in that regard consisted of.

A. We discussed that if Vancouver Plywood wasn't interested in the sale, that we were going to submit our own bid.

Q. Did you make arrangements between yourselves to submit a bid on that day?

A. Yes.

Q. What were those arrangements ?

A. We talked about it and then if Vancouver didn't submit a bid in a day or two, that we would go ahead and submit our bid." (Tr. 56)

Finally on July 15, 1957, Cameron and Crawford bid the minimum Government appraisal price. Crawford explained in his deposition that the bid was put in "to

insure ourselves of the tract of timber in the event that they didn't go ahead and buy" (Tr. 32). Immediately on placing the bid, Crawford advised Smith of the fact that the plaintiffs had put in a bid and explained to Smith "I told him that in the event they (Vancouver) decided not to buy the sale that Bob and I had decided that we were going to buy it and that we were going to enter a bid too so the next day I went down and put my check down for the sale, too" (Tr. 26). Cameron in his deposition, explained the placing of a bid as follows:

> "Q. Is it a fair statement of your testimony that the reason you made that bid was so that you would get the sale if Vancouver Plywood did not?
>
> A. Yes." (Tr. 42)

When the bid was put in on July 15th, which was at least two days and possibly four days before the sale (there is a variance in the testimony as to the exact date of the sale) the plaintiffs testified that they understood that they had a firm agreement with Vancouver to log the timber. Cameron testified,

> "Q. Then one other question: At the time that you were advised by the girl in the O. & C. office that Vancouver Plywood Company had submitted a bid, it was your understanding that you at that time had an agreement with Vancouver Plywood Company that you were to do that logging for them. Is that correct?

A. Yes, in the event they purchased the sale." (Tr. 73)

"Q. So isn't it a fair statement, then, Mr. Cameron, that once you found out that Vancouver Plywood Company had submitted a bid, it was your understanding that you were going to withdraw your bid because you had Vancouver's agreement that you would do the logging for them?

A. Yes, that is right." (Tr. 74)

Up to this point, the evidence indicates that the parties had a firm logging agreement contingent on Vancouver being the successful bidder at the Government sale.

On the date of the sale, Smith and Crawford drove together from Eugene to Roseburg, where the sale took place (Tr. 36). There were no other bidders at the sale (Tr. 39). Mr. Smith raised his bid "a nickel" and the timber was awarded to defendant, Vancouver Plywood Corporation (Tr. 39). After the sale, Cameron, Crawford and Smith agreed that Cameron and Crawford should begin logging the timber in thirty days (Tr. 40). Subsequently, the defendant placed another logger in the timber and this lawsuit resulted.

It is the position of the plaintiffs that a firm logging agreement was made at a date no later than July 6, 1957, subject, however, to Vancouver acquiring the timber at the Government sale on July 17th.

The defendant's contention that the plaintiffs' claim is based on an illegal contract to suppress bidding is predicated on a conversation which Crawford testified he had with Smith on July 17th while they were riding from Eugene to Roseburg to attend the Government sale. This conversation was as follows:

"Q. Just tell me what that discussion consisted of.

A. Well, I agreed that if Bob and I got the job of logging it, we would withdraw our bid.

Q. Well, just tell me who said what and what was said, if you will.

A. Well, I can't remember of too much being said other than that.

Q. You say you agreed that if you and Mr. Cameron got the logging job, you would withdraw your bid on the timber, is that correct?

A. Yes.

Q. And what did Mr. Smith say to that?

A. He said that would be all right.

Q. Do you say that he agreed that you would get the job?

A. Yes. [42]

Q. Then what, if anything else, was said?

A. That is a hard thing to answer. We talked about several things but it was small talk.

Q. Well, did you say anything more about this timber or the bidding on it or anything in connection wtih it?

A. No.

Q. Just what you have told me here now?

A. Yes.

Q. And just to be sure that we have it correctly and have all of it, you told Mr. Smith that if you and Mr. Cameron got the logging job, that you would withdraw your bid, and you say that he said that was agreeable, that you could have the job, is that correct?

A. Yes. I think there is one thing there I ought to correct. I think I said I submitted that bid on the 17th. It was a day or two before the 17th when that bid was put in." (Tr. 37, 38)

It should be noted that this conversation contains none of the elements of a contract. There is no mention of price, delivery dates, quantities of daily deliveries, road construction, or any of the other usual ingredients of a logging contract.

This conversation, when viewed in light of the previous dealings between the parties, reveals no illegal agreement. It will be recalled that approximately nine days before this conversation, Crawford and Smith of Vancouver had agreed that the plaintiffs would log the timber for $29.00 per thousand if Vancuover acquired it. In Crawford's conversation set forth above, Crawford is merely saying to Smith, "We intend to abide by our previous agreement. That agreement provided that Vancouver would buy the timber and we would log it.

We will not prevent Vancouver from buying the timber and we will expect Vancouver to live up to its part of the agreement and permit us to log the timber."

In the case of *Pyle* v. *Kernan,* 148 Or 666, the Court stated at page 673,

> "Courts have refused to declare any hard and fast rule for determining whether a contract is void as against public policy. Like fraud, public policy is difficult of definition. Each case must be determined in the light of its own particular state of facts. Hence, cases not based upon a similar fact situation are not helpful."

The rule is well established that any contract having as its *primary* object the stifling of competition at a public sale is illegal. (Restatement of Contracts, Sec. 517). However, there is a well-established exception to this rule and this case falls squarely within that exception. The exception is that two or more individuals having a joint interest in a piece of property to be sold at public sale can agree that one of their number will bid the property for the benefit of all. This exception is stated in *Restatement of Contracts,* Sec. 517.

> "A bargain between two or more persons that one shall bid at public auction for the benefit of all upon something about to be sold, which the parties desire to purchase together, either because they intend to hold it together or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar pur-

> pose, is legal in its character and will be enforced; but such a bargain, if made merely for the purpose of preventing competition and reducing the price of what is to be sold, is against public policy because operating as a fraud on the party offering it, and, therefore illegal."

To illustrate the exception, the Restatement gives the following example at page 1003:

> "A and B, attending an auction and each intending to bid for the purchase of a valuable painting agree with one another to bid for its purchase jointly and deal with it as a joint venture. Their agreement is legal although they anticipate that the painting will be sold more cheaply because they refrain from competition with one another."

This exception is stated in 45 *ALR* 551, as follows.

> "The co-operation of public contractors to accomplish an object which neither could gain if acting in his individual capacity is not within the rule, though it may prevent the rivalry of the parties, and thus lessen competition."

In this case, before the sale, the plaintiffs had agreed to log timber which Vancouver Plywood contemplated buying from the Government. Thus, each of the parties had an economic interest in the Government timber. The timber to Vancouver was a source of peelers for its mill, and the timber to the plaintffs provided a logging job. Certainly, under these circumstances and in light of the rule stated above, there

would be no objection to an agreement that Vancouver would acquire the timber and that Cameron and Crawford would not acquire it. If two individuals can legally agree among themselves that one will purchase the timber for the benefit of both, most certainly a logger can agree with a mill owner that the owner will acquire the timber and the logger will in turn log it. Implicit in the latter agreement is the agreement on the part of the logger that he will not acquire the timber. If the plaintiffs had refrained from bidding entirely because of their logging contract with Vancouver, it certainly could not be contended that the logging contract was illegal because it in effect removed the plaintiffs from the field of potential bidders. Is the situation here any different? When Crawford and Smith agreed on the terms of the logging contract the plaintiffs did not intend to make a bid. When it appeared that Vancouver might not bid at all at the sale, the plaintiffs entered a bid. When Vancouver did bid, the plaintiffs told Vancouver they would withdraw their bid because their logging contract necessarily required that Vancouver purchase the timber.

The defendant has placed much emphasis in the District Court and undoubtedly will do the same in this Court on the fact that Paragraph II of the complaint alleges.

"That on or about the 17*th day of July,* 1957, in Douglas County, Oregon, the plaintiffs and the defendant entered into an oral contract." (Emphasis supplied.)

The plaintiffs have urged that the date July 17, 1957, is the date of the above-quoted conversation between Smith and Crawford and hence we are relying on this conversation to evidence the logging contract.

The reason the date of July 17th was used in the complaint was because that was the date when Vancouver acquired the timber at the Government sale. The agreement which Vancouver and the plaintiffs had made on July 5th or 6th was contingent on Vancouver becoming the successful bidder on the Government sale on July 17th. The acquiring of the timber was the final act in bringing the contract into existence.

Assuming for the purposes of argument that we were in error in concluding that the contract came into existence when the timber was acquired on July 17th and that the contract was in fact made on July 5th or 6th, subject to being defeated by an event occurring on July 17th, i. e., Vancouver *not* acquiring the timber, or that the contract was made on July 5th or 6th subject to a condition subsequent occurring on July 17th, i. e., Vancouver acquiring the timber, certainly this error in properly *dating* the contract does not provide grounds for dismissal of the complaint.

In the lower court the defendant attributed some significance to the fact that there were only two bidders at the sale and one bidder withdrew. It will be recalled that the reason the plaintiffs put in a bid at all was because they feared that there would be no bidders at the sale. They feared that Vancouver was not going to put in a bid (Tr. 56). Crawford testified that he told Smith "that in the event they (Vancouver) decided not to buy the sale that Bob and I had decided that we were going to buy it" (Tr. 32). An effort to assure that there would be at least one bidder at the sale should not be twisted into an illegal scheme to "chill" the bidding.

CONCLUSION

We respectfully submit that there was no illegal agreement between the plaintiffs and the defendant and the judgment should be reversed and the cause remanded to the District Court for a trial on the merits.

Respectfully submitted,

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